SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1952.

No. 295

ARNETT M. HOWARD,
KENNETH M. JOHNSON,
EDWARD W. MICHEY, ET AL., - - Appellants,

versus

THE COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE, ET AL., - - - - - - - - Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

BRIEF FOR APPELLANTS.

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OPINIONS OF COURTS BELOW.

Judgment of the Jefferson Circuit Court, Chancery Branch, First Division, Kentucky (Record 19-21).

Judgment of the Jefferson Circuit Court, Chancery Branch, First Division, Kentucky, on mandate from the Court of Appeals of Kentucky (Record 22-23).

Commissioners of the Sinking Fund of the City of Louisville, et al., v. Howard, et al., 248 S. W. 2d 340.

Arnett M. Howard, et al., v. Commissioners of the Sinking Fund of City of Louisville, et al., 249 S. W. 2d 816.

SUBJECT INDEX.

	PAGE
Jurisdiction	2
Statement of Case	3
Assignment of Errors	5
The State's Jurisdiction and Its Right to Grant Power to City of Louisville to Annex This Territory Was Completely Ousted	8
This Jurisdictional Question Has Been Decided by the Court of Appeals of Kentucky	18
Land To Be Annexed Must Be Annexable	23
Apparent Dissenting Case	25
Title 4, U. S. C. A.	29
Conclusion	33

INDEX OF AUTHORITIES.

	PAGE
37 Am. Jur. 643	23
Arlington Hotel Co. v. Fant, 278 U. S. 439, 49 S. Ct. 227	12
Beard v. City of Alexandria, La., 341 U. S. 622, 71 S. Ct. 920	3
City of Louisville v. Sebree, 308 Ky. 420	30
Commonwealth v. King, 252 Ky. 699, 68 S. W. 2d 45	18, 21
Constitution of the United States, Clause 17, Section 8, Article I	1, 2, 5, 6, 10, 22
Constitution of the United States, 14th Amendment	6
Cook, et al., v. Commissioners of the Sinking Fund, 312 Ky. 1	30
Dean Milk Co. v. City of Madison, Wis., et al., 340 U. S. 349, 71 S. Ct. 295	3
Ft. Leavenworth R. R. v. Lowe, 114 U. S. 525, 5 S. Ct. 995	10, 11
General Laws of West Virginia, Sec. 3, Chapter I, Article I, Code of West Virginia	26
James v. Dravo Construction Co., 302 U. S. 134 (143)	22, 24, 25
James Stewart Co. v. Sadrakula, 309 U. S. 94, 60 S. Ct. 431	14, 24
Jamison v. State of Texas, 318 U. S. 413, 63 S. Ct. 669, 87 L. Ed. 869	3
Kentucky Constitution, Section 181	30
Kentucky Statutes, KRS 92.281	30
Kentucky Statutes, KRS 3.010	3, 8
Kentucky Statutes, KRS 81.100	7
Kentucky Statutes, KRS 3.020	22, 27
King Mfg. Co. v. City Council of Augusta, 277 U. S. 100, 48 S. Ct. 489, 72 L. Ed. 801	3

PAGE

Murray v. Joe Garrick Co., 291 U. S. 315, 54 S. Ct. 432 . . . . . 13, 14

Pacific Coast Dairy Co. v. Dept. of Agriculture of California, 318 U. S. 285, 63 S. Ct. 628 14

Silas Mason Co. v. Tax Commission, 302 U. S. 186, 58 S. Ct. 233 . . . . . 11, 24

S. R. A. Inc. v. Minn., 327 U. S. 558, 66 S. Ct. 749 27

Standard Oil Co. v. People of California, 291 U. S. 242, 54 S. Ct. 381 13

Surplus Trading Co. v. Cook, 281 U. S. 647, 50 S. Ct. 455 11

Title 4, Section 106, U. S. C. A 1, 2, 6, 29, 31, 32, 33

Title 28, Section 1257(2), U.S.C.A 2

Title 40, Section 255, U.S.C.A 4, 6, 7, 9, 14

United States v. Unzeuta, 281 U. S. 138, 50 S. Ct. 284. 12

United States v. Cornell, 2 Mason 60 19

Utah Power & Light Co. v. United States, 243 U. S. 389, 37 S. Ct. 387 (390) 15, 17

Western Union Telegraph Co. v. Childs, 214 U. S. 274, 29 S. Ct. 613 17

Yellowstone Park Transfer Co. v. Gallatin County, 31 F. 2d 644 . . . . . 10, 24

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THE COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE, ET AL., - *Appellees.*

BRIEF FOR APPELLANTS.

May it please the Court:

Two questions are presented by this appeal:

1. Can land owned by the United States, to which exclusive jurisdiction had been ceded by the State, and over which, as a result, the State's jurisdiction had been completely ousted for all purposes, be thereafter annexed by a municipality under the general laws of the State and subjected to the jurisdiction of the municipality, and

2. Can Title 4, Section 106, U.S.C.A., giving to States and other taxing authorities therein the right

to levy and collect an "income tax" from Federal employees in Federal areas, be extended to permit a municipality to collect an "occupational tax" from such Federal employees in Federal areas, when such municipality lacks jurisdiction to levy an "income tax" under the Constitution of the State.

JURISDICTION.

In the original petition filed by appellants the validity of the ordinance annexing the Federally owned territory was attacked as being repugnant to Clause 17, Section 8, Article I of the Constitution of the United States. The validity of the occupational tax or license fee ordinance was attacked on the ground that it was not an income tax within the meaning of Title 4, U. S. C. A., Section 106, Subsection "C," as the land on which the United States Naval Ordnance Plant is located was not "in the City" and was exclusively under the jurisdiction of Congress.

These questions were expressly passed upon by the Court of Appeals of Kentucky, and the validity of both ordinances upheld against the claim of their being repugnant to the Constitution and laws of the United States.

The Federal question involved herein has not been directly determined by this Honorable Court, and a determination of that question should be made.

The Supreme Court of the United States has jurisdiction of this question under Title 28, U. S. C. A., Section 1257(2).

King Mfg. Co. v. City Council of Augusta, 277 U. S. 100, 48 S. Ct. 489, 72 L. Ed. 801.

Jamison v. State of Texas, 318 U. S. 413, 63 S. Ct. 669, 87 L. Ed. 869.

Beard v. City of Alexandria, La., 341 U. S. 622, 71 S. Ct. 920.

Dean Milk Co. v. City of Madison, Wis., *et al.*, 340 U. S. 349, 71 S. Ct. 295.

STATEMENT OF CASE.

In December, 1940, the United States brought condemnation proceedings in the District Court for the Western District of Kentucky to obtain title to a tract of land lying just south of the territorial limits of the City of Louisville, on which the United States Naval Ordnance Plant was later constructed. The land was purchased by and with the consent of the Legislature of Kentucky under the general statutes, Section 3.010 KRS, which provides:

> "The Commonwealth of Kentucky consents to the acquisition by the United States of all lands and appurtenances in this State heretofore legally acquired, or that may be hereafter legally acquired by purchase, or by condemnation, for the erection of forts, magazines, arsenals, dock yards, post offices, custom houses, courthouses and *other needful buildings,* and for locks, dams and canals in improving the navigation of the rivers and waters within and on the borders of Kentucky." (Emphasis ours.)

Thereafter a deed conveying title of this land to the United States was recorded in the office of the Clerk of the Jefferson County Court, Kentucky.

Thereafter, on May 23, 1941, acting under authority of Title 40, U. S. C. A., the Acting Secretary of the Navy, the Hon. James Forrestal, accepted "exclusive jurisdicton" over the tract of land in question, which acceptance of exclusive jurisdiction was acknowledged by the Governor of Kentucky, the Hon. Keen Johnson, on May 26, 1941.

On April 1, 1947, *six years after* the United States had acquired title to the land and had acquired exclusive jurisdiction over it, the City of Louisville enacted an ordinance by which it proposed to annex to the City of Louisville certain territories lying east and south of the then City limits, and which ordinance *included the tract of land* owned by the United States and over which it had accepted exclusive jurisdiction, and on which, *at that time,* the United States Naval Ordnance Plant was located. On June 27, 1950, *nine years after the United States had acquired title to the land and had assumed exclusive jurisdiction,* the City enacted Ordinance 179, Series 1950, by which the territory embraced in the 1947 proposal ordinance was declared to be annexed to the City of Louisville.

On May 23, 1951, appellants, acting in behalf of themselves and all other employees of the United States Naval Ordnance Plant, filed a declaratory judgment action in the Jefferson Circuit Court in which the validity of the annexation of the land owned by

the United States and over which it had acquired exclusive jurisdiction was attacked (Record 2-8), as being repugnant to the Constitution of the United States, Clause 17, Section 8, Article I.

Demurrers were filed by the appellees, which were overruled by the lower court, and on October 25, 1951, the court rendered an opinion in which it held that after the United States had acquired title to the land in question, and had accepted exclusive jurisdiction over it, that thereafter the land for all purposes ceased to be a part of the State within whose borders it lies, and therefore the ordinance annexing the land to the City was void in so far as the land upon which the United States Naval Ordnance Plant was located was concerned (Record 13-19).

Appellees appealed to the Court of Appeals of Kentucky, and on March 28, 1952, that Court reversed the action (Record 27-30).

ASSIGNMENT OF ERRORS.

Appellants assign the following errors in the record and proceedings in this cause:

1. The Court of Appeals of Kentucky erred in upholding the validity of the annexation ordinance, in so far as the Federal area is concerned, and in holding and deciding that the said ordinance did not violate Clause 17, Section 8, Article I, of the Constitution of the United States.

2. The Court of Appeals of Kentucky erred in holding that after the United States had acquired title

to the Federal area in question, and had, by reason of its use, exclusive jurisdiction under Clause 17, Section 8, Article I, of the Constitution of the United States, and also by affirmative action of the Acting Secretary of the Navy under Title 40, Section 255, U. S. C. A., the City of Louisville could, by ordinance enacted under the general laws of the State of Kentucky, annex such Federal area so as to make it a part of the City of Louisville and subject to its jurisdiction.

3. The Court of Appeals of Kentucky erred in holding that the City of Louisville's Occupational Tax or License Fee was an "income tax" within the meaning of the Congressional Act of 1940, shown as Title 4, Section 106, U. S. C. A., and in holding that said occupational tax or license fee was not an income tax under the Constitution of Kentucky.

4. The Court of Appeals of Kentucky erred in holding that these appellants were not deprived of their property without due process of law under the Fourteenth Amendment of the Constitution of the United States (Record 32-33).

AFTER THE UNITED STATES HAD ACQUIRED TITLE TO THE LAND AND HAD ACCEPTED "EXCLUSIVE JURISDICTION" OVER IT, THE JURISDICTION OF THE STATE OF KENTUCKY CEASED FOR ALL PURPOSES.

Appellants contend that by reason of the acquisition by the United States of said lands on which the United States Naval Ordnance Plant is located, the acceptance of *exclusive jurisdiction* by the United States under Title 40, U. S. C. A., and the Governor's acknowledgment of the acceptance of exclusive jurisdiction by the United States, the land, to all intents and purposes, ceased to be a part of the State (Kentucky) within whose borders it lies for all purposes, and thta consequently the State of Kentucky and/or the City of Louisville have no legislative jurisdiction or any jurisdiction over the territory on which the United States Naval Ordnance Plant is located, or over any activities carried on thereon, or over any person on the enclave. The land on which the United States Naval Ordnance Plant is located never was and can never be geographically a part of the City of Louisville.

When the State of Kentucky ceded exclusive jurisdiction to the United States over the land in question, the City of Louisville could not acquire or take jurisdiction which the State of Kentucky did not have, and hence, acting under the general statute giving to the city the right to annex any unincorporated territory (KRS 81.100) (Appendix A) the City was necessarily restricted to such unincorporated and continu-

ous territory over which the State had jurisdiction, and was barred from annexing any territory over which the State did *not* have jurisdiction. In other words, the City of Louisville could not do *indirectly* what the State of Kentucky could not do *directly*. And so we arrive at the positive conclusion that the territory on which the United States Naval Ordnance Plant is located, to all intents and purposes, not being a part of the State of Kentucky, could not and can not lawfully be annexed so as to become a part of the City of Louisville, and that consequently the ordinance (No. 179, Series 1950) in so far as it affects the land in question is void, and was void from its inception.

THE STATE'S JURISDICTION AND ITS RIGHT TO GRANT POWER TO CITY OF LOUISVILLE TO ANNEX THIS TERRITORY WAS COMPLETELY OUSTED.

On all the law and facts the City could not *legally* annex this territory. This land was acquired by the United States and it had absolute title to it. The land was acquired by and with the consent of the Legislature of the State of Kentucky by virtue of KRS 3.010, *supra*. As heretofore set forth, on May 23, 1941, the United States, acting by and through the Hon. James Forrestal, Acting Secretary of the Navy, accepted exclusive jurisdiction over the territory by a letter to the Governor of Kentucky, which exclusive jurisdiction was effective at 12 o'clock noon on May 28, 1941, and this acceptance of exclusive jurisdiction by the

United States was acknowledged by Governor Keen Johnson on May 26, 1941. The acceptance of exclusive jurisdiction by the United States was in accordance with Title 40, U. S. C. A., Section 255, which provides, in part, as follows:

> "Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases, and at such times as he may deem advisable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing notice of such acceptance with the Governor of such State or in any such other manner as may be prescribed by law of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.'

When the United States, after acquiring title to the property in question with the consent of the Legislature of the State, and had in addition thereto ac-

cepted "exclusive jurisdiction" as provided by Title 40, U. S. C. A., above set out, the land so purchased ceased to be a part of the State in whose borders it lies. Ft. Leavenworth R. R. v. Lowe, 114 U. S. 525, 5 S. Ct. 995.

This principle of law was again expressed in the case of Yellowstone Park Transfer Co. v. Gallatin County, 31 F. 2d 644. In that case, Gallatin County, Montana, attempted to *tax personal property* owned by a Delaware corporation having its situs in that portion of Yellowstone Park within the territorial limits of that State and county. In 1891 Montana had ceded to the United States exclusive jurisdiction over and with respect to all lands within Yellowstone National Park, reserving concurrent jurisdiction for the execution of process, civil and criminal, lawfully issued by the courts of that State. The tax attempted to be collected was covered by a statute enacted *after* the date of cession. The Court, in denying the right to collect the tax, said:

> "In other words, after the date of cession, the ceded territory was as much *without the jurisdiction* of the State making the cession *as was any other foreign territory* except in so far as jurisdiction was expressly reserved." (Emphasis ours.)

The case above set out is for territory embraced in a national park, and is not Clause 17, Section 8, Article I, of the Constitution of the United States type of property.

Further, in the same case, the Court continued:

> "If exclusive jurisdiction over that portion of the park in the State of Montana was lawfully ceded to the United States, the cession inured to the benefit of both corporations and individuals, and the power to tax property in the ceded territory, whether corporate or individual, was at an end."

Attention is also called to the case of Surplus Trading Company v. Cook, 281 U. S. 647, 50 S. Ct. 455, wherein it is said:

> "When the United States acquires title to lands, which are purchased by the consent of the legislature of the State within which they are situated 'for the erection of Forts, Magazines, Arsenals, Dock-yards, and *other needful buildings*' (Const. Art. I, Sec. 8), the *Federal jurisdiction is exclusive of all State authority.*" (Emphasis ours.)

Numerous other decisions from this Honorable Court have held similar views in connection with jurisdiction over lands to which the United States has acquired title and to which exclusive jurisdiction has been ceded by the States, the universal holding being that when purchased by the United States with the consent of the Legislature of the State, and exclusive jurisdiction has been accepted by the United States, the jurisdiction of the State is *completely ousted* and to all *juridical* intents and purposes the land ceases to be a part of the State within whose borders it lies. Ft. Leavenworth R. R. v. Lowe, *supra;* Silas Mason

Co. v. Tax Commission, 302 U. S. 186, 58 S. Ct. 233; United States v. Unzeuta, 281 U. S. 138, 50 S. Ct. 284; Arlington Hotel Co. v. Fant, 278 U. S. 439, 49 S. Ct. 227.

In the Silas Mason Co. v. Tax Commission case, *supra*, this Court said:

> "The question of exclusive territorial jurisdiction is distinct. That question assumes the absence of any interference with the exercise of the functions of the Federal Government and is whether the United States has acquired exclusive legislative authority so as to debar the State from exercising *any legislative authority*, including its *taxing* and *police power* in relation to the *property* and *activities* of *individuals and corporations* within the territory." (Emphasis ours.)

Can there be any question, so far as concerns the lands upon which the United States Naval Ordnance Plant is located, that there is a complete absence of any right in the State of Kentuky to interfere with the exercise of the functions of the Federal Government, or to *tax*, or to *regulate, license* or *exercise any jurisdiction whatever?* And, too, under authority of the cases cited, has the State of Kentucky any right or power to exercise any legislative authority in this territory? All of these prohibitions exist with reference to this particular tract of land, just the same as it exists with reference to the lands embraced in the Fort Knox Military Reservation. Kentucky has no jurisdiction of any kind there. Her power to tax, her police power, and all other activities are debarred.

After the acquisition of the land by the United States, and acceptance of "exclusive jurisdiction" by the United States over such lands, neither the State of Kentucky nor the City of Louisville could legislate *effectively* concerning matters beyond their jurisdiction and within territory subject *only* to control of the United States. Standard Oil Co. v. People of California, 291 U. S. 242, 54 S. Ct. 381; Murray v. Joe Garrick Co., 291 U. S. 315, 54 S. Ct. 432.

In the Garrick case, *supra,* the State of Washington attempted to extend the provisions of the Workmen's Compensation Law to cover employees of a private corporation engaged in work in the Puget Sound Navy Yards. The State Supreme Court held that the compensation act could not apply to territory beyond the authority of the State Legislature. On appeal to the Supreme Court of the United States, this Court said:

> "But it also held that act could not have any force in the Navy Yards, since it was adopted many years after the cession of jurisdiction by the State and the consequent acquisition of the tract by the United States. In this the Court was clearly right. *After the effective date of the State's cession the jurisdiction of the federal government was exclusive.*" (Emphasis ours.)

And so we again find the statement laid down by this Court that after the effective date of the State's cession of jurisdiction, the jurisdiction is exclusively in the United States, and neither the State Legislature, and certainly in this case, the City of Louisville, can

effectively legislate on any matter affecting such territory, and this necessarily includes the right to annex such territory.

It is generally recognized that State laws in effect prior to the transfer of exclusive jurisdiction from the State to the United States may continue in effect in the absence of Congressional legislation thereon, but once exclusive jurisdiction has been accepted by the United States (Title 40, U. S. C. A., *supra*), then all State laws, and of necessity City ordinances, cease to be a part of the laws of such territory. Hence, future statutes or ordinances of the City are not a part of the body of laws in the ceded area. James Stewart Co. v. Sadrakula, 309 U. S. 94, 60 S. Ct. 431.

In the case of Pacific Coast Dairy v. Dept. of Agriculture of California, 318 U. S. 285, 63 S. Ct. 628, the Department of Agriculture of California attempted to regulate minimum price regulations on all milk sold to the War Department at Moffett Field. In denying the right to so regulate prices, this Court said:

> "Where California Milk Control Act was adopted after acquisition of Moffett Field by United States, minimum price regulations under the Act were inapplicable to sales of milk to War Department at the Field, since as to such federal territory Congress had combined powers of a general and State government."

Still another case holding similar views is Murray v. Joe Garrick & Co., *supra*, where this Court held that after the effective date of State's cession of exclusive

jurisdiction to the United States, Federal jurisdiction was exclusive and laws subsequently enacted by State were ineffective in such territory.

Even the State's power of eminent domain is null and void over land which has been acquired by the United States with the consent of the Legislature of the State, and over which the United States has accepted exclusive jurisdiction. Utah Power & Light Co. v. United States, 243 U. S. 389, 37 S. Ct. 387 (390).

In the latter case the United States brought an action to enjoin the continued use and occupancy, without its consent, of certain of its lands in forest reservation for works employed in generating and distributing electric power. The Power & Light Company contended that the claim must be tested by the laws of the State in which the lands were located, rather than by the legislation of Congress, and urged that lands of the United States within a State, when not used for a fort or other governmental purpose of the United States, are subject to the jurisdiction, powers and laws of the State in the same way and to the same extent as are lands of others. This Court, in answering that contention, said:

"To this we cannot assent."

And, further, the opinion said:

"* * * the settled course of legislation, congressional and state, and repeated decisions of this Court, have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States, be acquired.

"The State and the public generally almost uniformly accepted this legislation as controlling, and in the instances where it has been questioned in this court its validity has been upheld and its *supremacy over State enactments sustained.*" (Emphasis ours.)

The same opinion then continues:

"And so we are of opinion that the inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them.

"It results that State laws, including those relating to the exercise of the power of eminent domain, have no bearing upon a controversy such as is here presented, save as they may have been adopted or made applicable by Congress."

Isn't what the Court of Appeals of Kentucky holds in this cause the same thing contended for by the Power & Light Company in the case cited above? Here too, it was urged that this case must be tested by the laws of Kentucky rather than by the legislation of Congress, and that the land in question, owned by the United States and over which it has been ceded exclusive jurisdiction, and although used by the Navy Department as an "arsenal," is subject to the jurisdiction, powers and the laws of Kentucky in the same manner and to the same extent as are lands of others. The Court of Appeals of Kentucky held, in effect, that although the State of Kentucky had affirmatively ceded "exclusive

jurisdiction" to the United States, it can now, under the general laws, give to the City the right, power and authority to annex this territory and subject it to its ordinances, in the face of all authorities holding that after exclusive jurisdiction has been ceded to the United States, *the State in whose borders the land lies cannot legislate in any way concerning said lands,* and in the face of repeated decisions of this Honorable Court that in all cases where this has been questioned in this Court its validity has been upheld, and "its supremacy over State enactments sustained." Utah Power & Light Co. v. United States, *supra.* Isn't giving to the City of Louisville the right to annex this territory legislating concerning the land?

Still another case which clearly demonstrates the lack of power in a State to enact legislation which can affect territory owned by the United States and over which it has accepted exclusive jurisdiction is Western Union Telegraph Co. v. Childs, 214 U. S. 274, 29 S. Ct. 613, wherein it was held that the exclusive legislative power which Congress possesses over the Norfolk Navy Yards, excludes giving any operation or effect, within limits of such Navy Yards, to the provisions of the Virginia Code imposing a penalty upon telegraph companies for failure to deliver a message to addressee.

THIS JURISDICTIONAL QUESTION HAS BEEN DECIDED BY THE COURT OF APPEALS OF KENTUCKY.

This jurisdictional question has been decided by the Court of Appeals in an entirely different manner. In the case of Commonwealth v. King, 252 Ky. 699, 68 S. W. 2d 45, the bookkeeper of the Bank of Stithton was indicted in the Hardin Circuit Court for the offense of making false entries upon the books of the bank. Stithton was included in the lands comprising Fort Knox Military Reservation, and the bank was located on lands purchased by the United States and over which it had exclusive jurisdiction, both under the Constitution of the United States and under State law. A plea to the jurisdiction of the court was filed and sustained, and the Commonwealth appealed for a certification of the law. In affirming the lower Court, the Court of Appeals of Kentucky, Chief Justice Rees, said:

> "The question sharply presented is: Does section 8 of article I of the Federal Constitution give exclusive jurisdiction to the United States over offenses committed on land owned by the United States and acquired by it for one of more of the enumerated purposes by the consent of the Legislature of the State in which the land is located? In the light of the construction uniformly given Section 8 or article I of the Federal Constitution and the State statutes similar to our Section 2376 by the Supreme Court of the United States and numerous State courts of last resort, the answer to the question must be 'Yes.'

"It is the contention of the commonwealth that in enacting Section 2376 of our Statutes it was not the purpose of the Legislature to cede jurisdiction, but merely to consent to the acquisition by the United States of the land for the purposes specified in the act. The consent of the acquisition of land within the State by the United States, given by Section 2376, is without reservation. No right is reserved to the State."

And, further along in the same opinion, the Court of Appeals of Kentucky, said:

"When the Legislature of a State consents to the purchase of land by the United States, its consent may be accompanied by such reservation or conditions as it may see fit to impose, so long as they are not inconsistent with the free and effective use of the land for the public purposes intended. * * *

"But, in the absence of reservation in the consenting act, federal jurisdiction over land acquired by the United States by consent of the State is *exclusive of State authority.*" (Emphasis ours.)

And further in the opinion it quoted Mr. Justice Story's opinion in United States v. Cornell, Fed. Cas. No. 14867, 2 Mason, 60, as follows:

"When therefore a purchase of land for any of these purposes is made by the national government, and the State Legislature has given its consent to the purchase, the land so purchased by the very terms of the constitution *ipso facto* falls within the exclusive legislation of Congress, and the *State jurisdiction is completely ousted.* This is the neces-

sary result, for exclusive jurisdiction is the attendant upon exclusive legislation; and the consent of the State Legislature is by the very terms of the constitution by which all the States are bound, and to which all are parties, a virtual *surrender* and *cession* of its sovereignty over the place." (Emphasis ours.)

The Court of Appeals of Kentucky then continues:

"The question is not an open one. It long has been settled that, where lands for such a purpose are purchased by the United States with the consent of the State Legislature, the *jurisdiction theretofore residing in the State passes,* in virtue of the constitutional provisions, to the United States, *thereby making the jurisdiction of the latter the sole jurisdiction.* * * *

"When the United States purchases land in a State with the consent of its Legislature for one of the purposes enumerated in article I of Section 8 of the Federal Constitution, exclusive jurisdiction is acquired by the federal government, though cession of its jurisdiction by the State is not declared unequivocally, and the cases heretofore cited so hold." (Emphasis ours.)

And so we see the Court of Appeals of Kentucky holding in that case that the question is not an open one; that the jurisdiction of the State *ipso facto* is ousted . Such being the case, how then can the State, under its general laws, give any right, power or authority to the City of Louisville to annex such territory so as to acquire any jurisdiction over same, or even make it a part of the City. We think the answer is obviously it cannot.

The Court of Appeals of Kentucky, in its opinion (R. 27) recognizes the fact that when title to lands has been acquired by the United States, and the United States has acquired exclusive jurisdiction over that land, that thereafter the jurisdiction of the State and its political subdivisions is completely ousted, and to all intents and purposes the land ceases to be a part of the State within whose borders it lies; that such areas occupy the same status as if they were separate provinces or countries. It then states, after citing numerous cases so holding, that "we do not question the soundness of those cases, but we think they are not controlling of the issue before us." The issue before the Court of Appeals of Kentucky was, as previously stated, that the jurisdiction of the State *for all purposes* had been ceded to the federal government, and that consequently neither it nor the City of Louisville could acquire *any jurisdiction* over the territory, including the jurisdiction to annex. In other words, the Court of Appeals of Kentucky has held, although in ceding exclusive jurisdiction in the land in question to the United States the State of Kentucky reserved no jurisdiction or made any reservations of any kind, *that it must be read into the cession a reservation of its (the State) right to, under its general laws, give to the City the right, power and authority to annex the territory* and thus exercise legislative jurisdiction over the tract. This in the face of its opinion in the case of Commonwealth v. King, *supra*, and the many decisions from this Honorable Court holding to the contrary, and that the cession of the State's jurisdiction to the United States

constitutes a virtual "surrender and cession of its sovereignty over the place."

The United States Naval Ordnance Plant is an arsenal, or at least comes within the constitutional phrase "other needful buildings." The phrase "other needful buildings" has been construed by this Court as "embracing whatever structures are found to be necessary in the performance of the functions of the federal government." James v. Dravo Construction Co., 302 U. S. 134 (143). Therefore, in whatever category the Ordnance Plant falls, arsenal or "other needful buildings"—it certainly falls within the "exclusive jurisdiction" clause of Section 8 of Article I of the Federal Constitution.

Under its general laws giving permission or consent to the United States to purchase lands in Kentucky, the Legislature reserved no jurisdiction for this class of property. By Section 3.020 KRS (Kentucky Statutes), it is provided:

> "Kentucky retains jurisdiction for the execution of process, issued under its authority, over all lands in Kentucky heretofore or hereafter ceded to or acquired by the United States for the erection or establishment of post offices, custom houses, courthouses, locks, dams, canals, parks, cemeteries or forest reserves."

Nowhere was there a reservation of any jurisdiction for any of the land needed as an arsenal, or forts, magazines, etc., mentioned in the Constitution of the United States.

LAND TO BE ANNEXED MUST BE ANNEXABLE.

In order that territory may be annexed to a municipality it should have such unity of interest with the corporation as will make it a proper subject of municipal government. 37 Am. Jur. 643. What unity of interest with this tract of land, owned by the United States, and over which the United States has exclusive jurisdiction, can the City of Louisville have to "make it a proper subject of municipal government"? The State of Kentucky cannot legislate to affect it in any wise—consequently the City of Louisville cannot legally legislate for the territory, and cannot extend its jurisdiction to cover the territory by annexation. To put it another way—what it cannot *control* it cannot annex.

Generally, the City of Louisville has authority under the general laws of the State to annex territory contiguous to its boundaries; but where, as in this cause, prior to any attempt on the part of the City to annex, the State had ceded its jurisdiction to the United States, and such exclusive jurisdiction has been accepted by the United States, under all the decisions of this Court, the jurisdiction of the State was completely ousted and the State could not give to the City, under a general law, the right, power or authority to annex said territory and extend the jurisdiction of the City over said territory. It would be just as reasonable to say that the Town of West Point, a Sixth Class city, would annex all of the territory embraced in the Fort Knox Military Reservation.

It is a fundamental rule that a municipal corporation, in the exercise of its legislative powers, cannot enact any ordinance violative of the Constitution of either the Unted States or the State. However, both the State and the City have done this— violated the Constitution of the United States (Section 8, Article I) and Title 40, U.S.C.A., Section 255. How, then, can the City inflict its jurisdiction over the land on which the United States Naval Ordnance Plant is located?

The Constitution of the United States, by which all the States are bound, and to which are all parties, provides unequivocally that "Congress shall have exclusive jurisdiction, etc." This power was granted to Congress by the people of the original thirteen States, and as each succeeding State came into the Union, it adopted that Constitution as the law of the land. And each of the cases heretofore cited herein, states in almost identical language, that after the United States has acquired title to property within a State with the consent of that State's legislature, and had accepted exclusive jurisdiction, that thereafter the "jurisdiction of the State in whose boundaries the land lies, to all intents and purposes, is completely ousted, and the said State cannot legislate, police, regulate, nor *tax* corporations or individuals in such territory. Yellowstone Park Transfer Co. v. Gallatin County, *supra;* Silas Mason Co. v. Tax Commissioner, *supra;* James v. Dravo Construction Co., 302 U. S. 134, 58 S. Ct. 208; James Stewart Co. v. Sadrakula, 309 U. S. 94, 60 S. Ct. 431.

APPARENT DISSENTING CASE.

The Dravo Construction case above cited, at first blush, would seem to dissent from the previous cases cited. But let us examine that case. The question involved there was the *constitutional validity* of a tax imposed upon the gross receipts of the Construction Company. The case was reversed by this Court solely on the ground that TITLE to the river beds was in the State, althought subject to the power of Congress to use the lands under the streams "For any structure which the interest of navigation, in its judgment, may require." But, although burdened by that servitude, *"the State held title."* The opinion in that case continues:

> "There does not appear to have been any acquisition by the United States of *title* to these lands, unless as respondent urges, the occupation of the beds for the purpose of the improvement constituted an acquisition of title. But as the occupation was simply the exercise of the dominant right of the Federal Government, the servient *title* continued as before. No transfer of that *title* appears." (Emphasis ours.)

And so we see that in that case there never was a transfer of *title* to the United States, *nor any act by the United States to acquire either title or exclusive jurisdiction,* but there existed concurrent jurisdiction with the State.

The opinion further points out that at various times it is not unusual for the United States to own within

a State lands which are set apart and upon which are constructed structures for public purposes, without acceptance of exclusive jurisdiction, and that it is not mandatory for the United States to accept exclusive jurisdiction, and then adds:

> "Such ownership and use *without more* do not withdraw the lands from the jurisdiction of the State. The lands remain part of her territory and within the operation of her laws." (Emphasis ours.)

Then the opinion continues that when title *has* been acquired by the United States, and it has accepted exclusive jurisdiction then the State cannot *legislate in any way in such territory.* The opinion continues:

> "Clause 17 governs those cases where the United States acquires lands with the consent of the Legislature of the State for the purposes there described. If lands are otherwise acquired, and jurisdiction is ceded by the State to the United States, the *terms of the cession,* to the extent that they may lawfully be prescribed, that is, consistent with the carrying out of the purpose of acquisition, *determine the extent of the federal jurisdiction.*" (Emphasis ours.)

This Court could not have reached a different conclusion in the Dravo case, when we look to the statute ceding to the United States the rights exercised by it in the lands involved. As pointed out by this Court, Section 3 of the General Laws of West Virginia (Section 3, Chapter I, Article I, Code of West Virginia)

cedes to the United States "concurrent jurisdiction with the State in and over any land so acquired * * * *for all purposes.*" Concurrent jurisdiction, not exclusive jurisdiction, and "for all purposes."

In the light of that case, let us examine the Kentucky laws to ascertain what jurisdiction was retained by it in ceding jurisdiction to the United States. As pointed out heretofore, Section 3.020 KRS retained jurisdiction for the service of legal process over land ceded to or acquired by the United States for the erection of post offices, custom houses, courthouses, locks, dams, canals, parks, cemeteries, or forest reserves. And this is all. Nowhere has there been a retention of her jurisdiction to permit annexation, to pass legislation governing the territory, or to tax, regulate, police, or in any manner to *control* the territory, and the word "arsenal" is singularly lacking from the enumerated structures.

The same principle of law was stated in the Sadrakula case, *supra.* In that case it was held that every vestige of the laws of the State must vanish, but that in some cases, the jurisdiction of the State continues until abrogation of those rules existing at the time of the surrender of the sovereignty. When a State reserves some jurisdiction, *that* jurisdiction remains. When absolute or exclusive jurisdiction is ceded, then *nothing* remains.

Another case in point is that of S. R. A., Inc., v. Minn., 327 U. S. 558, 66 S. Ct. 749. In that case the State of Minnesota was attempting to collect taxes on

property which had been deeded by the United States to an individual, and which had formerly been held by the United States as "exclusive jurisdiction" property. This Court affirmed the lower court in its holding that the property could be taxed, on the assumption that the State had accepted impliedly the return of jurisdiction by the United States to the State. But in that opinion this Honorable Court again stated:

> "The right of a State to tax realty directly depends primarily upon its territorial jurisdiction over the area. The realty of petitioner had been conveyed to and used by the United States for the essential governmental activities which authorizes the exercise of its exclusive legislative jurisdiction. Exclusive legislative power is in essence complete sovereignty. That is, not only is the Federal property immune from taxation because of the supremacy of the Federal Government, but *State, laws,* not adopted directly or impliedly by the United States, are ineffective to *tax* or regulate *other property or persons* upon that enclave." (Emphasis ours.)

The New Century Dictionary defines "enclave" as "an outlying portion of a country, entirely surrounded by the territory of another country." Consequently, the land on which the United States Naval Ordnance Plant is located, title to which is in the United States, and over which the United States has accepted exclusive jurisdiction, is a "separate country or province" under all the decisions of this Honorable Court.

In other words, while the United States holds title and "exclusive jurisdiction" for use of the land under the Constitution or by cession of the State, the State in whose boundaries the said land lies is entirely divested of all jurisdiction if the United States is to exercise "complete sovereignty," unless the plain language of the Constitution does not mean what it says.

TITLE 4, U. S. C. A.

We now come to the question of the effect of Title 4, U. S. C. A., Section 106. The pertinent part of that act reads as follows:

> "No person shall be relieved from liability for any *income tax* by any State, or by any duty constituted taxing authority therein, *having jurisdiction to levy such a tax*, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area, and such State or taxing authority shall have full jurisdiction and power to levy and collect *such tax* in any Federal area within said State to the same extent and with the same effect as though such area was not a Federal area." (Emphasis ours.)

Subsection "C" of Title 4, Section 106, defines "income tax" as a tax levied on, with respect to or measured by net income, gross income, or gross receipts.

And so we see that this Act applies strictly to "income tax," or net incomes, gross incomes or gross receipts. In 1950 the City of Louisville enacted an ordinance levying and collecting an "occupational tax or

license fee" from all persons engaged in activities "in the City" (Appendix B).

Kentucky Constitution, Section 181, authorizes the Legislature to permit cities to impose taxes on franchises, trades, occupations and professions. Kentucky Statute 92.281, passed under authority of the section of the Kentucky Constitution above set out, reads in part as follows:

> "Cities of all classes are authorized to levy and collect any and all taxes provided for in Section 181 of the Constitution of the Commonwealth of Kentucky, and to use the revenue therefrom for such purposes as may be provided by the legislative body of the City."

Nowhere is there any authorization, either in the Constitution or the Statute, for cities to "levy and collect an income tax."

The Court of Appeals of Kentucky, realizing that a municipal corporation could not, under the Constitution of Kentucky, levy an "income tax;" had previously held (City of Louisville v. Sebree, 308 Ky. 420) that the occupational tax levied by the City of Louisville under the ordinance was *not* an "income tax," but that it "lays the tax upon the privilege of working * * * within the City"; that the ordinance imposes "an annual *license fee* for the privilege of engaging in said activities."

Again, in the case of Cook, *et al.*, v. Commissioners of the Sinking Fund, 312 Ky. 1, the Court of Appeals of Kentucky said:

"As we have pointed out, the tax imposed by the Ordinance in question is not an *income tax.*" (Emphasis ours.)

But in this action we see the Court of Appeals of Kentucky saying:

"It is true we held in the Sebree case that the tax was *not an income tax within the meaning of* the Kentucky Constitution, but the question here is whether it is an income tax as that term is defined in the Act of Congress."

It must be remembered that Title 4, Section 106, says any State or taxing authority therein, *having jurisdiction to levy such a tax,* etc. No municipality in Kentucky has, as previously stated, authority to levy and collect an "income tax." Nor does Title 4, Section 106, give to municipalities the absolute right to levy an "income tax" on Federal employees in Federal areas. If the taxing authority lacks "*jurisdiction to levy such a tax,*" and the City of Louisville certainly lacks such jurisdiction under the Constitution of the Commonwealth of Kentucky, then the provisions of Title 4 cannot apply.

It is strange that if, as stated by the Court of Appeals of Kentucky, this "license fee" or "occupational tax" is an "income tax" within the meaning of Title 4, Section 106, Subsection C (net incomes, gross incomes, or gross receipts), the city exempts from the tax all receipts from stock dividends, interest on bonds, notes, deposits, and many other income-producing activities, as well as from rentals from real estate. If the terms

"net income, gross income, or gross receipts" means what the Court of Appeals of Kentucky now holds, why isn't the ordinance made to include these items. Is it because this would in fact constitute an "income tax," which, as previously shown, the City lacks jurisdiction to levy?

As previously stated, Title 4, Section 106, does not give to States and other taxing authorities therein the absolute right to levy and collect an "income tax," but simply gives to those taxing authorities who can qualify under the clause *"having jurisdiction to levy such a tax"* the right to levy and collect an "income tax" from Federal employees in Federal areas.

If, as held by the Court of Appeals of Kentucky, the "license fee" or "occupational tax" is an "income tax" within the meaning of Title 4, Section 106, or even a tax based on "income," then it follows that the Occupational Tax Ordinance (Appendix 4, Statement of Jurisdiction) is not only void as to Federal employees in Federal areas, but in its entirety, even to its application to persons who reside in and receive wages from occupations and activities carried on "in the City," as the City of Louisville, as has been pointed out several times, lacks the right, power or jurisdiction to levy and collect an "income tax" of any kind.

CONCLUSION.

We respectfully submit that the ordinance by which the City of Louisville annexed to its territorial limits the land which was owned by the United States and over which the United States had accepted exclusive jurisdiction was and is void in so far as it affects the land in question, and that therefore the said land cannot be said to be "in the City" within the meaning of the Occupational Tax Ordinance, nor does Title 4, Section 106 apply to this area, as the City of Louisville lacks "jurisdiction to levy" an income tax of any kind, and that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX "A."

K. R. S. 81.100.—Annexation statute for cities of the first-class reads as follows:

"The boundaries of cities of the first class shall remain as established by law until changed as provided in KRS 81.100 to 81.130. Whenever a city of the first class desires to annex any unincorporated territory or to reduce the boundaries of the city, the city legislative body may enact an ordinance, defining accurately the boundary of the territory proposed to be annexed or stricken off. The ordinance shall be published in at least ten issues of the daily paper published in and having the largest circulation in the city. In not less than thirty days after the enactment of the ordinance, if the publication has been made and no petition has been filed in the circuit court as provided in K.R.S. 81.100, the city legislative body may enact another ordinance annexing to the city or striking from the city the territory described in the ordinance. Upon the enactment of this ordinance, the territory shall become part of the city, or be stricken from the city."

APPENDIX "B."

ORDINANCE 83, SERIES 1950.

On and after July 1, 1950, every person, association, corporation, or other entity engaged in any occupation, trade, profession, or other activity in the City shall pay into the Sinking Fund of the City for the purposes set forth under Section 91.200 of the Kentucky Revised Statutes as amended by an Act of the General Assembly of 1950, an annual license fee for the privilege of engaging in said activities, which license fee shall be measured by one per centum of (a) all salaries, wages, commissions and other compensation earned by every person in the City for work done or services performed or rendered in the City; and (b) the net profits of all businesses, professions, or occupations from activities conducted in the City.